**MASHA SINGH BHAGAT SINGH**

**v.**

**GOH CHUAN HIN & ORS**

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
MAHADEV SHANKAR JCA
DENIS ONG JCA
[CIVIL APPEAL NO: N-02-429-95]
20 NOVEMBER 1997

***CONTRACT:*** *Misrepresentation - Back to back agreement agreements - Whether contract vitiated by misrepresentation - Dependency of agreements on each other - Surrounding circumstances - Whether to be examined - Whether sufficient to give rise to inference of misrepresentations*

***EVIDENCE:*** *Conflicting testimony - Contradictions - Contradictions in parts of evidence - Whether only due to poor recollection of facts - Rejection of whole evidence by trial judge - Whether improper - Whether a misdirection*

On 24 June 1984 the 1st, 2nd, 3rd and 4th respondents ('the respondents') entered into an agreement with one Cheok whereby they sought to purchase a piece of land ('the said land') from Cheok for RM263,244 ('the June agreement'). Six weeks later, on 27 July 1984, the respondents entered into an agreement with the appellant, and by that, undertook to sell the said land to the appellant for RM650,000 ('the July agreement'). A deposit of RM37,300 was paid by the appellant upon executing this agreement.

The appellant was not aware of the June agreement when executing the July agreement. The facts also showed that the respondents did not pay Cheok any consideration upon executing the June agreement, and only paid Cheok a deposit of RM37,300 after receiving the appellant's deposit aforesaid. It was also evident that the appellant, in executing the two agreements, had timed the respective completion periods thereof in such a way that, had the appellant paid them 50% of the purchase price under the July agreement (ie, a sum of RM325,000), they would be able to use that sum to wholly pay Cheok and complete the June agreement.

The appellant claimed that the respondents had induced him to execute the July agreement by way of misrepresentations, and so refused to complete the July agreement. The respondents, who were unable to perform their bargain with Cheok under the June agreement, terminated the July agreement and

consequently forfeited the RM37,500 deposit paid them by the appellant. The appellant then filed the present suit and claimed for: (i) a recission of the July agreement; (ii) a refund of the RM37,500 deposit; and (iii) damages for misrepresentation. Before the learned judge below, however, the appellant had conflicted himself on certain parts of his evidence, and his whole evidence had been rejected by the learned trial judge. The appellant's claim, in the circumstances, was dismissed whereupon the appellant appealed. Before the learned appellate judges, the main issue that arose was whether the learned judge, in wholly disbelieving the appellant, had misdirected himself in law.

**Held:**

**Per Siti Norma Yaakob JCA**

**[1]** The June and July agreements are back to back agreements. This means that the performance of one agreement was very much dependent on the other although it must be admitted that the appellant was not privy to the June agreement. The dependency of the two agreements is evident from the facts.

**[2]** The learned judge failed to consider any of the factors that showed the dependency of the two agreements on each other, and the effect that they might have on the appellant's claim. Instead he disbelieved the appellant altogether as he found that the appellant had contradicted himself.

**[3]** A perusal of the notes shows that the so-called contradictions appearing in the appellant's evidence lie in his poor recollection of the amount he actually paid as deposit under the July agreement. Whilst he was able to testify that he made a cash payment of RM7,300 on 26 July 1984 and a second payment of RM30,000 through a cheque, he was rather confused as to whether he paid the balance of the deposit amounting to RM12,700 to any of the five respondents.

**[3a]** Since contradiction lies in one aspect of his evidence and that there was a concession made on his behalf that only RM37,300 was paid as deposit, the trial judge had misdirected himself when he failed to consider the other aspects of the appellant's testimony. Had he done so, there is sufficient evidence for him to conclude that the circumstances surrounding the executions of the June and July agreements and their dependence on each other might well have given rise to the inference that the 1st, 2nd, 3rd and 4th respondents could have represented anything to the appellant in their efforts to make a quick gain.

**[4]** The appellant performed his part obligations by paying part of the deposit due from him despite the fact that cl. 2(b) of the July agreement should have put him on notice that the 1st, 2nd, 3rd and 4th respondents were not the registered proprietors of the land. This shows that the presence of such clauses did not preclude the probability that representations in the manner described by the appellant were uttered and that the appellant acted upon them to his detriment. As showed by the facts, that detriment happened when he parted with the RM37,300 deposit and the loss of that sum of money when the 1st, 2nd, 3rd and 4th respondents forfeited it upon the termination of the July agreement on 8 March 1985.

**[5]** The learned trial judge erred in rejecting the whole of the appellant's evidence on the basis of contradictions which only affected one aspect of his evidence. He overlooked the fact that the back to back agreements and the unusual facts of this case wholly supported the credibility of the appellant's contentions.

*[Appeal allowed to the extent that 1st to 4th respondents refund the RM37,300 with interest.]*

*[**Bahasa Malaysia** Translation of Headnotes]*

Pada 24 Jun 1984, responden-responden pertama, ke-2, ke-3 dan ke-4 (responden-responden tersebut) telah memasuki satu perjanjian dengan seorang yang bernama Cheok dalam mana mereka berbincang untuk membeli sebidang tanah (tanah tersebut) dari Cheok pada nilai RM263,244 (perjanjian Jun tersebut). Enam minggu kemudiannya, pada 27 Julai 1984, responden tersebut memasuki satu perjanjian dengan perayu, dan dengan itu memutuskan untuk menjual tanah tersebut kepada perayu pada nilai RM650,000 (perjanjian Julai tersebut). Satu deposit sebanyak RM37,300 telah dibayar oleh Perayu setelah menyempurnakan perjanjian ini.

Perayu telah tidak mengetahui tentang perjanjian Jun tersebut ketika menyempurnakan perjanjian Julai tersebut. Fakta-fakta juga menunjukkan bahawa responden-responden tersebut tidak membayar sebarang balasan kepada Cheok ketika menyempurnakan perjanjian Jun tersebut, dan hanya membayar Cheok deposit sebanyak RM37,300 selepas menerima bayaran deposit daripada perayu tersebut. Ianya juga nyata bahawa perayu, dalam menyempurnakan kedua-dua perjanjian tersebut, telah merancang tempoh penyelesaiannya dalam keadaan di mana, apabila perayu membayar kepada mereka 50% dari harga belian di bawah perjanjian Julai tersebut (iaitu jumlah sebanyak RM325,000), mereka akan dapat menggunakan jumlah itu untuk membayar Cheok dengan sempurna dan menyelesaikan perjanjian Jun tersebut.

Perayu mendakwa bahawa responden-responden telah memujuknya untuk menyempurnakan perjanjian Julai tersebut melalui salahnyataan, dan dengan itu enggan menyelesaikan perjanjian Julai tersebut. Responden-responden yang tidak berupaya untuk melaksanakan bahagian mereka terhadap Cheok dalam perjanjian Jun tersebut, telah membatalkan perjanjian Julai dan seterusnya, merampas deposit berjumlah RM37,500 yang dibayar kepada mereka oleh perayu. Perayu kemudiannya memfailkan guaman semasa tersebut dan menuntut untuk: (i) pembatalan perjanjian Julai; (ii) pembayaran balik deposit sebanyak RM37,500; dan (iii) gantirugi bagi salahnyataan. Di hadapan hakim yang bijaksana tersebut, walaubagaimanapun, perayu telah mengelirukan dirinya dalam beberapa bahagian kenyataannya, dan seluruh kenyataannya telah ditolak oleh hakim yang bijaksana. Tuntutan perayu, dalam keadaan demikian yang berhubung dengan rayuannya adalah ditolak. Di hadapan hakim-hakim Mahkamah Rayuan, isu utama yang timbul adalah samada hakim yang bijaksana, dalam tidak mempercayai perayu secara menyeluruh, telah tersalah pertimbangan di sisi undang-undang.

**Diputuskan:**
**Oleh Siti Norma Yaakob HMR**

**[1]** Perjanjian-perjanjian Jun dan Julai adalah perjanjian sandar menyandar. Ini bermakna bahawa pelaksanaan satu perjanjian itu bergantung pada perjanjian yang satu lagi, walaupun ia perlu diakui bahawa perayu tidak terlibat dalam perjanjian Jun tersebut. Kebergantungan kedua-dua perjanjian ini adalah terbukti melalui fakta-fakta tersebut.

**[2]** Hakim yang bijaksana gagal mempertimbangkan sebarang faktor yang menunjukkan, kebergantungan kedua-dua perjanjian tersebut, antara satu sama lain, dan kesannya terhadap tuntutan perayu. Sebaliknya, beliau telah tidak mempercayai perayu sepenuhnya, kerana beliau mendapati bahawa perayu telah mengelirukan dirinya sendiri.

**[3]** Penelitian nota-nota tersebut menunjukkan bahawa pengeliruan yang dikatakan wujud dalam pengataan perayu adalah disebabkan oleh kelemahannya dalam mengumpul semula jumlah sebenar yang telah dibayar olehnya sebagai deposit di bawah perjanjian Julai. Dalam keupayaannya untuk memberi keterangan bahawa beliau membuat pembayaran tunai sebanyak RM7,300 pada 26 Julai 1984 dan bayaran kedua sebanyak RM30,000 melalui satu cek, beliau telah keliru sama ada beliau telah membayar baki deposit yang berjumlah RM12,700 kepada mana-mana daripada kelima-lima responden tersebut.

**[3a]** Oleh kerana percanggahan wujud dalam satu aspek pengataannya dan telah terdapat suatu konsesi yang dibuat bagi pihaknya bahawa hanya RM37,300 telah dibayar sebagai deposit, hakim perbicaraan telah tersalah pertimbangan apabila beliau gagal untuk mempertimbangkan aspek-aspek lain dalam keterangan perayu. Jika beliau telah melakukan sedemikian, terdapat bukti-bukti yang mencukupi bagi beliau merumuskan bahawa keadaan-keadaan yang mengelilingi penyempurnaan perjanjian-perjanjian Jun dan Julai dan kebergantungan kedua-duanya antara satu sama lain telah berkemungkinan menyumbang kepada kesimpulan bahawa responden-responden pertama, ke-2, ke-3 dan ke-4 mungkin telah mewakilkan apa sahaja kepada perayu dalam usaha mereka untuk membuat keuntungan segera.

**[4]** Perayu melaksanakan kewajipannya dengan membayar sebahagian dari deposit yang kena dibayar olehnya sungguhpun menurut fakta fasal 2(b) perjanjian Julai sepatutnya telah menyedarkannya bahawa responden-responden pertama, ke-2, ke-3 dan ke-4 adalah bukannya pemilik berdaftar tanah tersebut. Ini menunjukkan bahawa kehadiran fasal-fasal sedemikian tidak menghalang kebarangkalian bahawa perwakilan dalam unsur yang digambarkan oleh perayu telah disebutkan dan perayu telah melaksanakannya dalam memudaratkan dirinya. Seperti yang ditunjukkan melalui fakta-fakta tersebut, kemudaratan tersebut berlaku apabila beliau membayar depsoit sebanyak RM37,300 dan kerugian jumlah wang itu apabila responden-responden pertama, ke-2, ke-3 dan ke-4 merampasnya ketika pembatalan Perjanjian Julai pada 8 Mac 1985.

**[5]** Hakim perbicaraan yang bijaksana telah tersalah dalam menolak keseluruhan pengataan perayu atasar percanggahan yang mana hanya memberi kesan kepada satu aspek pengataannya. Beliau telah tidak memberi perhatian kepada hakikat bahawa perjanjian sandar menyandar dan fakta-fakta luas biasa dalam kes ini menyokong sepenuhnya kesahihan penegasan perayu.

*[Rayuan dibenarkan setakat mana responden-responden pertama hingga ke-4 membayar balik RM37,300 dengan faedah.]*

*For the appellant - Joseph Yeo (Ng Thiang Tuan with him); M/s AJ Ariffin, Yeo & Harpal*

*For the respondents - D Krishna (R Ledchumiah with him); M/s Ramamoorthy Ledchumiah & Co*

*[Appeal from Civil Suit No: 25-643-87]*

*Reported by Rusnah Abd Aziz*

**JUDGMENT**

**Siti Norma Yaakob JCA:**

In these proceedings, the plaintiff/appellant had maintained two causes of action against the five defendants/respondents. The first against all five respondents is for misrepresentation which the appellant claims induced him to execute a sale and purchase agreement dated 27 July 1984 with the 1st, 2nd, 3rd and 4th respondents to purchase an undivided half share in a piece of property from them. Additionally the 5th respondent, an advocate and solicitor who acted for both the appellant and the 1st, 2nd, 3rd and 4th respondents in the sale transaction is also sued for negligence for breaching his duties as a solicitor. For these two causes of action the appellant claims:

(1) a rescission of the sale and purchase agreement dated 27 July 1984 as against the 1st, 2nd, 3rd and 4th respondents.

(2) a refund of the RM50,000 deposit made under the agreement.

(3) damages for misrepresentation against all five respondents.

(4) damages for negligence as against the 5th respondent.

(5) costs against all five respondents.

These matters are pleaded in the appellant's statement of claim.

On 23 November 1987, judgment in default of appearance was entered against the 2nd respondent and that left the 1st, 3rd, 4th and 5th respondents to defend the case which they did through two statements of defence, one filed by the 1st, 3rd and 4th respondents jointly and the other by the 5th respondent separately.

The 1st, 3rd and 4th respondents deny that they had misrepresented any fact to the appellant but that it was the appellant who had breached the agreement for failing to pay the balance of the purchase price of the land by the completion date and acting under cl. 7 of the agreement, they terminated the agreement on 8 March 1985 and forfeited the deposit.

The 5th respondent also denied any misrepresentation or negligence on his part and counter-claimed for damages against the appellant for falsely and maliciously defaming him when the appellant lodged a complaint with the secretary, Bar Council alleging misrepresentation and negligence on the part of the 5th respondent. The complaint had led to an inquiry being held on 10 May 1986 and after evidence was adduced, the inquiry committee held that

a the complaint did not disclose a case of professional misconduct against the 5th respondent. Despite this finding the 5th respondent contends that the complaint had injured his character and reputation and for this counter-claimed for general and special damages, interest and costs against the appellant.

b Faiza Tamby Chik J, who heard the case dismissed the appellant's claims with costs on the ground that there were contradictions in the appellant's evidence and that he could not be believed. The learned judge also dismissed the 5th respondent's counter-claim with costs on the ground that the appellant's complaint to the Bar Council was not made maliciously for the purpose of injuring the 5th respondent's character and reputation as an advocate and
c solicitor. The 5th respondent has not appealed against that finding but the appellant has appealed against the dismissal of his claims and hence the present proceedings before us.

At the trial in the High Court, the following facts were undisputed.

d The land in question was and at the time of the trial still registered in the name of one Cheok Cheng Loon (Cheok). As a vendor, Cheok had entered into a sale and purchase agreement to sell the whole of the land covering an area of more than 21 acres to the 1st, 2nd, 3rd and 4th respondents for a consideration of RM263,244. The sale and purchase agreement dated 14 June
e 1984 (the June agreement) was prepared by the 5th respondent who acted as the solicitor for both Cheok and the purchasers.

Six weeks later on 27 July 1984, the 5th respondent prepared a second sale and purchase agreement this time executed by the 1st, 2nd, 3rd and 4th
f respondents with the appellant, wherein the 1st, 2nd, 3rd and 4th respondents as vendors agreed to sell an undivided half share of the same land that they had purchased from Cheok, to the appellant for the agreed price of RM650,000. It is this second sale and purchase agreement (the July agreement) that the appellant relies to maintain his causes of action against the 1st, 3rd, 4th and 5th respondents for misrepresentation and additionally for negligence against
g the 5th respondent. However before us, Mr. Joseph Yeo, counsel for the appellant indicated that he was not claiming damages against the 5th respondent for deceit and we take this to mean that the appellant was not pursuing his claims of misrepresentation and negligence against the 5th respondent.

h

Under cl. 1 of the July agreement, a 10% deposit of RM50,000 was acknowledged by the 1st, 2nd, 3rd and 4th respondents to have been received from the appellant but the evidence shows that only part of it amounting to RM37,300 was proven to have been paid. This is borne out by two receipts
i issued by the 5th respondent's firm dated 26 July 1984 for RM7,300 and

another dated 22 August 1984 for RM30,000. Mr. Harpal Singh, the appellant's counsel in the court below conceded that only RM37,300 of the deposit was made by the appellant under the July agreement and that the same sum of money was paid by the 5th respondent to Cheok on 25 August 1984 to make up the deposit and part of the balance of the purchase price due from the 1st, 2nd, 3rd and 4th respondents under the June agreement. This sum together with another RM3,000 were the only monies paid as consideration under the June agreement which eventually expired for non-performance on the part of the 1st, 2nd, 3rd and 4th respondents.

It is the appellant's case that after he executed the July agreement and after he had made the deposit, he discovered that the 1st, 2nd, 3rd and 4th respondents had no capacity to transfer the property to him as the land was never registered in their names. He further claimed that he would not have agreed to purchase the property if the respondents had not assured and represented to him that the purchase price due to Cheok under the June agreement had already been paid in full and that subdivision of the property would be carried out upon the execution of the July agreement.

It was on the basis of the undisputed and proven facts that the learned trial judge assessed the appellant's evidence to be inconsistent and rejected it altogether. Before we consider the correctness of that finding it is necessary that we delve a little bit further into the characteristics of the June and July agreements.

The 5th respondent has described the two agreements to be back to back agreements and by this we take it to mean that the performance of one agreement was very much dependent on the other, although it must be admitted that the appellant was not privy to the June agreement. The dependency of these two agreements is evident from the following undisputed facts.

1. Nothing was paid as consideration under the June agreement until the 1st, 2nd, 3rd and 4th respondents received the RM37,300 deposit made by the appellant under the July agreement. On 25 August 1984, the 5th respondent paid the same amount of money to Cheok to fulfill the 1st, 2nd, 3rd and 4th respondents' obligation under the June agreement.

2. The July agreement fixes a completion date in cl. 2(b) but the June agreement is silent on this. To overcome this, Cheok and the 1st, 2nd, 3rd and 4th respondents varied the June agreement on 21 November 1984 (the November agreement) to include a completion date at cl. (b) in the November agreement, this being five months from the date of the November agreement ie, on or before 21 April 1985.

3. Under the July agreement had the appellant made the following payments.

(a) the deposit of RM50,000 under cl. 1 and

(b) the first instalment of the balance of the purchase price amounting to RM275,000 under cl. 2(a) on or before 26 January 1985,

the two sums totalling RM325,000 would be more than sufficient to enable the 1st, 2nd, 3rd and 4th respondents to fulfill their obligation to settle the full purchase price of RM263,244 under the June agreement.

4. The presence of cl. 2(b) in the July agreement is yet another indicator. Under that clause, the second instalment of the balance of the purchase price amounting to RM325,000 was to have been paid by the appellant within one month of receipt of a notice in writing from the 1st, 2nd, 3rd and 4th respondents to the effect that a separate issue document of title in respect of the undivided half share has been issued by the relevant authorities.

Unfortunately the learned trial judge failed to consider any of the above factors and the effect they might have on the appellant's claims. Instead he disbelieved the appellant altogether as he found that the appellant had contradicted himself.

A perusal of the notes of evidence shows that the so-called contradictions appearing in the appellant's evidence lie in his poor recollection of the amount he actually paid as deposit under the July agreement. Whilst he was able to testify that he made a cash payment of RM7,300 on 26 July 1984 and a second payment of RM30,000 through a cheque issued by Messrs. Mohd. Ibrahim & Co., a firm of solicitors who had acted for him in the sale of his house, the appellant was rather confused as to whether he paid the balance of the deposit amounting to RM12,700 to any of the five respondents. This state of affairs had led to his own counsel conceding that only RM37,300 was paid as deposit under the July agreement. Since the contradiction lies in one aspect of his evidence and that there was a concession made on his behalf that only RM37,300 was paid as deposit, we consider that the learned trial judge had misdirected himself when he failed to consider the other aspects of the appellant's testimony. Had he done so there is sufficient evidence for him to conclude that the circumstances surrounding the executions of the June and July agreements and their dependence on each other might well have given rise to the inference that the 1st, 2nd, 3rd, and 4th respondents could have represented anything to the appellant in their efforts to make a quick gain.

In this instance the appellant performed his obligations by paying part of the deposit due from him despite the fact that cl. 2(b) of the July agreement should have put him on notice that the 1st, 2nd, 3rd and 4th respondents were not the registered proprietors of the land. This shows that the presence of such clauses did not preclude the probability that representations in the manner described by the appellant were uttered and that the appellant acted upon them to his detriment. In this instance that detriment happened when he parted with the RM37,300 deposit and the loss of that sum of money when the 1st, 2nd, 3rd and 4th respondents forfeited it upon the termination of the July agreement on 8 March 1985.

As for the appellant's complaint that such forfeiture is illegal as the 1st, 2nd, 3rd and 4th respondents had breached cl. 3 of the July agreement by their failure to apply to the relevant authorities to partition the land upon the execution of the agreement, that requirement is a non issue as being only beneficial owners as opposed to registered owners, they had no capacity to make such an application in the first place.

We think that the learned trial judge erred in rejecting the whole of the appellant's evidence on the basis of contradictions which only effected one aspect of his evidence. He overlooked the fact that the back to back agreements and the unusual facts of this case wholly supported the credibility of the appellant's contentions.

Since the July agreement had already been terminated, the only loss suffered by the appellant was the forfeiture of the deposit and the right to the enjoyment of the money. To compensate the appellant for his losses, we allowed his appeal to the extent that the 1st, 3rd and 4th respondents refund the sum of RM37,300 to the appellant with interest thereon at the rate of 8% per annum from 30 March 1995 (date of the High Court order) to date of realisation. We made no order as to costs of this appeal as the appellant was only partially successful in his claims and we also ordered that the deposit for costs be refunded to him.